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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANK JOSEPH COVIN, Defendant and Appellant.	E068841 (Super.Ct.No. FVI1501365) OPINION

APPEAL from the Superior Court of San Bernardino County. Lisa Rogan, Judge. Affirmed in part; reversed in part with directions.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

On June 1, 2015, 22-year-old defendant and appellant Frank Joseph Covin was staying with his father, Prospare Landry, and his father's girlfriend, Laurel Roberts, in a

house located in an unincorporated area of Barstow. Sometime the prior evening, defendant shot both Roberts and Landry in the back of their heads and left them to die in the pools of their blood while he watched television. When police arrived he hid and a standoff ensued until he voluntarily exited the home several hours later. Defendant was convicted of two counts of first degree murder, the special circumstance of multiple murder and two firearm enhancements.

Defendant makes the following claims on appeal, that (1) the imposition of two consecutive mandatory life without the possibility of parole sentences (LWOP) pursuant to Penal Code[1] section 190, subdivision (a)(3), without consideration of his relevant individualized factors constituted cruel and unusual punishment under the Eighth Amendment.; and (2) the case should be remanded to the trial court for resentencing in light of Senate Bill No. 620 (SB 620), which amended section 12022.53 after the sentence was imposed in this case to allow for a trial court to dismiss a firearm enhancement within its discretion.

We will order remand to the trial court for it to exercise its discretion whether to strike or impose the firearm enhancements pursuant to section 12022.53, subdivision (h). We otherwise affirm the judgment.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty of the first degree murder of Landry and Roberts (§ 187, subd. (a)). The jury also found true for both counts that defendant personally used a firearm causing great bodily injury and death (§ 12022.53, subd. (d)).[2]

Defendant's motion to strike the enhancement and/or punishment pursuant to section 190.2, subdivision (a)(3) was denied. The trial court sentenced defendant to 50 years to life for the two firearm enhancements followed by two consecutive LWOP terms.

B. FACTUAL HISTORY

Landry and Roberts lived together in Hinkley, an unincorporated area of Barstow. Hannah Raggio was Roberts's sister and they spoke daily on the telephone or Raggio would go their house. Defendant, who was Landry's son, stayed with them on occasion.

Raggio did not talk to Roberts on Sunday, May 30, 2015. At 7:20 a.m. on June 1, Raggio sent a text to Roberts but never received a response. After Roberts still had not responded to additional texts and phone calls, Raggio went to the house around 4:00 p.m. All of their vehicles were in the driveway. As she approached the front door, she heard the deadbolt lock being engaged. She yelled "Open up the door" numerous times but there was no response.

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[2] Defendant was charged with having suffered two prior prison terms (§ 667.5, subd. (b)) but the People dismissed the allegations in the interests of justice.

Raggio left but returned at 5:00 p.m. with her father and her boyfriend, Dean Dilbeck. Raggio went to the back door. As she approached, she saw a hand reach out, close the screen door and engage the screen's deadbolt, then close the back door and engage the deadbolt. Dilbeck was able to see into the kitchen and observed defendant looking back at him. Dilbeck yelled at him to open the door but defendant walked back into the living room.

San Bernardino County Sheriff's Deputy Michael Chacon was dispatched to the home of Roberts and Landry around 5:50 p.m. on June 1. All the doors and windows were locked and he could not see inside. He announced himself as a sheriff's deputy but there was no response. Not seeing any circumstances warranting forced entry, he did not enter the house; he advised Raggio, Dilbeck and Raggio's father to go home.

Around 8:30 p.m., Raggio was still concerned. Dilbeck and Raggio went back to the house. They banged on the doors but got no response. They were able to get a key from the landlord. They again called the police

San Bernardino County Sheriff's Sergeant and Patrol Watch Commander Matthew Griffith and Deputy Kelsey Parsons decided to go the Hinkley house when the second call was received from family members. Sergeant Griffith and Deputy Parsons went to the front door. They could see inside that someone was watching television. Deputy Parsons was able to see defendant, sitting on the couch, through a crack in the curtains. Sergeant Griffith announced his presence and advised defendant to come to the door. Deputy Parsons tapped on a window advising defendant he needed to come out of the

house so they could speak with him about Roberts and Landry. Defendant did not respond. They decided to enter the residence using the key obtained from the landlord.

As Sergeant Griffith entered the home, he observed bloody shoeprints on the floor. They opened a door leading to a hallway and Roberts was lying on the floor clearly deceased. Sergeant Griffith became concerned because they could not see defendant. Sergeant Griffith and Deputy Parsons exited the house. They set up a perimeter and used PA announcements to get defendant to come out of the home. Defendant finally walked out of the house after seven hours.

No other suspects were found in the house. Landry and Roberts had pools of blood around their faces, which appeared dried. There were bloody shoe prints throughout the house. In the bedroom where Landry and Roberts had been shot, a backpack was found containing a pistol. A fired cartridge case was found in a trash bag located outside the house. Another cartridge case was underneath Landry's body. The cartridge cases were fired from the firearm found inside the backpack. Roberts died from a single gunshot wound to her head, with death occurring within minutes. Landry also died from a single gunshot wound to the head, with death occurring within seconds.

Defendant was interviewed at the sheriff's detention center. He admitted he shot both Roberts and Landry with a stolen gun he kept in his backpack. He stated he heard voices in his head that night. The voices told him to kill himself but he obviously did not do it. Defendant never expressed any remorse for the killings.

Defendant testified on his own behalf. He was 20 years old in 2015.[3] All defendant recalled was waking up on June 1, 2015, and Landry and Roberts being on the floor. However, he also admitted he reached into his backpack and took out a gun he had previously stolen. He walked into Landry's bedroom and shot him in the head. Defendant then hid from Roberts. When she walked past him into their bedroom, he followed after her and shot her in the head. He admitted he was the only person in the house. He was not really sure what had happened; he just felt "weird" that night.

DISCUSSION

A. CRUEL AND UNUSUAL PUNISHMENT

Defendant claims, not in order for this court to grant relief but rather to preserve his constitutional challenge for future review, that the imposition of two consecutive LWOP sentences without consideration of his individual characteristics constituted cruel and unusual punishment under the state and federal Constitutions. We follow the reasoning in the recent decisions of *People v. Perez* (2016) 3 Cal.App.5th 612 (*Perez*), *People v. Abundio* (2013) 221 Cal.App.4th 1211, and *People v. Argeta* (2012) 210 Cal.App.4th 1478 (*Argeta*), which rejected similar claims.

1. *ADDITIONAL HISTORY*

Once defendant was convicted of two first degree murders and the jury found the special circumstance of multiple murder true pursuant to section 190.2, subdivision (a)(3), the trial court mandatorily had to impose LWOP sentences. Prior to sentencing,

[3] Defendant's date of birth is May 19, 1993; on June 1, 2015, defendant was 22 years old.

defendant filed a motion to strike the enhancement and/or punishment pursuant to the special circumstance, as it was cruel and unusual punishment. Defendant cited to *Graham v. Florida* (2010) 560 U.S. 48, in which the United States Supreme Court ruled that mandatory LWOP sentences were unconstitutional for non-homicide offenses while under the age of 18, and *Miller v. Alabama* (2012) 567 U.S. 460, in which the United States Supreme Court ruled that it was unconstitutional to impose mandatory LWOP sentences on juveniles for homicide. Defendant also referred to the California Supreme Court case of *People v. Franklin* (2016) 63 Cal.4th 261, in which a person who is under the age of 18 when he or she commits a crime should be given an opportunity to make a record of mitigating evidence tied to his or her youth in preparation for a later youth offender parole hearing.

Defendant's counsel argued that although these above-mentioned cases did not apply to those offenders over the age of 18, it was "not outside the realm of possibility" that in the future that some kind of leniency could apply to defendant. Defendant attached a "Biopsychosocial Assessment" performed by Rebecca Irwin, MSW. Defendant was not cooperative during an interview with her but did express that he had difficulty in his relationships and that if he had lived with his mother during his life, his life would have been better. Defendant also attached an evaluation by a psychologist completed in 2015 to determine whether defendant was suffering from a mental illness that would meet the legal criteria for a not guilty by reason of insanity defense. The psychologist reached the opinion that there was not enough information to formulate an opinion as to whether defendant suffered from a mental illness.

The People opposed the motion, arguing that the trial court did not have the authority to strike the special circumstance.

At the sentencing hearing, the trial court denied defendant's motion, stating, "the Court does agree with the People that there is really no legal basis for me to change or divert from the required sentence by law." Victim impact statements were heard by the trial court. The trial court addressed the fact that probation was not appropriate because there was "no criteria justifying an unusual case" and also found no mitigating factors. The trial court then imposed the sentence, providing no further statements about the crimes or defendant.

2. *ANALYSIS*

In *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380, the California Supreme Court acknowledged that the United States Supreme Court has drawn a line at the age of 18 for its "Eighth Amendment jurisprudence." We are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In *Perez*, *supra*, 3 Cal.App.5th 612, the 20-year-old defendant was sentenced to an 86-year-to-life sentence for three attempted murders. On appeal, the defendant contended that his sentence constituted cruel and unusual punishment. First, the court addressed the United States Supreme Court authority in regards to LWOP sentences for juvenile offenders as follows: "In *Roper v. Simmons* (2005) 543 U.S. 551, 575[], the Court held the imposition of capital punishment on juvenile offenders for any offense whatsoever violated the Eighth Amendment. In *Graham v. Florida* (2010) 560 U.S. 48, 74 [], the Court held the imposition of a life-without-possibility-of-parole sentence on a

juvenile offender for a nonhomicide offense violated the Eighth Amendment. Finally, in *Miller v. Alabama* (2012) 567 U.S. 460 [], the Court held 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders,' although a trial court could in its discretion impose such a sentence after considering how children are different and how the differences weigh against a life sentence." (*Id.* at p. 616.) It also noted that the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262, found, referencing the above authority, " 'sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.' " (*Perez*, at p. 616.)

The *Perez* court noted the defendant was arguing that although he was 20 years old at the time of his crime, and admitted "*Roper*, *Graham*, *Miller* and *Caballero* [were not] 'directly applicable to him,' " the defendant argued nonetheless that the court "should 'appl[y] equally to defendants of [his] age.' " (*Perez, supra*, 3 Cal.App.5th at p. 617.) The appellate court rejected this argument finding, "We decline Perez's invitation to conclude new insights and societal understandings about the juvenile brain require us to conclude the bright line of 18 years old in the criminal sentencing context is unconstitutional." (*Ibid.*)

In *Argeta*, *supra*, 210 Cal.App.4th 1478, the defendant—who received the functional equivalent of a LWOP sentence, but who was 18 years old at the time of the offense—argued his sentence constituted cruel and unusual punishment under both the federal and state Constitutions. (*Id.* at pp. 1481-1482.) The appellate court concluded

that the defendant was not entitled to the same relief as a juvenile co-offender, concluding "while '[d]rawing the line at 18 years of age is subject . . . to the objections always raised against categorical rules . . . [,it] is the point where society draws the line for many purposes between childhood and adulthood.' [Citations.] Making an exception for a defendant who committed a crime just five months past his 18th birthday opens the door for the next defendant who is only six months into adulthood. Such arguments would have no logical end, and so a line must be drawn at some point. We respect the line our society has drawn and which the United States Supreme Court has relied on for sentencing purposes, and conclude Argeta's sentence is not cruel and/or unusual under *Graham*, *Miller*, or *Caballero*." (*Id.*, at p. 1482.)

Finally, in *People v. Abundio*, *supra*, 221 Cal.App.4th 1211, the court rejected the defendant's argument that although the jury found he committed first degree murder, and they found the special circumstance true that the defendant committed the murder during the commission of the robbery—he was 18 years old at the time—he was entitled to an individualized sentence rather than a mandatory LWOP sentence. (*Id.* at pp. 1213, 1220.) The court relied on its previous holding in *Argeta* that society had drawn the line at the age of 18 in rejecting the argument. (*Abundio*, at pp. 1220-1221.)

We see no reason to find that these cases were improperly decided. Based on the foregoing, the imposition of the LWOP sentences in this case were not cruel and unusual punishment.

Moreover, section 3051 supports that the Legislature continues to set the age for leniency to juvenile offenders at 18 for LWOP sentences. Section 3051 allows for a

youth offender parole hearing in the 15th year of a 25-years-to life sentence for an offender who was under the age of 25 years at the time of the commission of his or her crime. (§ 3051, subds. (b)(2), (b)(3).) Section 3051, subdivision (b)(4) provides that a person who committed their crime before he or she reached the age of 18 and received a LWOP sentence is also entitled to a youth offender parole hearing during his or her 25th year of incarceration. However, these provisions do not apply to cases "in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age." (§ 3051, subd. (h).)

Accordingly, we conclude that defendant's two consecutive LWOP sentences for the brutal shooting of two innocent victims do not violate the Eighth Amendment's proscription against cruel and unusual punishment.

B. SENATE BILL 620

Defendant contends remand for the trial court to exercise its discretion to dismiss the gun enhancements imposed pursuant to section 12022.53, subdivision (h), after the passage of SB 620, effective January 1, 2018, which amended that section, is required. The People concede the amendment is retroactive but that remand is unnecessary because the trial court would not have exercised its discretion to strike the firearm enhancements even if it was aware it had the discretion to do so.

Former section 12022.53, subdivision (h) required that a true finding under section 12022.53, subdivision (d) mandated a 25-years-to-life sentence. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1082.) SB 620 modified this section and authorized trial courts to

strike section 12022.53 enhancements for purposes of sentencing. The modification took effect on January 1, 2018, several months after defendant was sentenced. (Stats. 2017, ch. 682, § 2.) Section 12022.53, subdivision (h) now states, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section."

As conceded by the People, the amendment is retroactive. (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; *People v. Woods*, *supra*, 19 Cal.App.5th at p. 1090.) However, the People argue that remand would be futile because the record shows that the trial court clearly indicated at sentencing that it would not have stricken the firearm enhancement.

In *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425, the court discussed remand for resentencing after the enactment of SB 620. It concluded that remand was proper because "the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements. Although the court imposed a substantial sentence on McDaniels, it expressed no intent to impose the maximum sentence. To the contrary, it imposed the midterm for being a felon in possession of a firearm, and it ran that term concurrently to the term for the murder. It also struck '[i]n the interest of justice' four prior convictions it had found true. Thus, nothing in the record rules out the possibility that the court would exercise its discretion to strike the firearm enhancement under section 12022.53, subdivision (d), which doubled McDaniels's total sentence, and then either impose time for one of the stayed lesser firearm enhancements or strike them as well. While we express no opinion on how the

court should exercise its discretion on remand, that discretion is for it to exercise in the first instance." (*Id*. at pp. 427-428.)

In *People v. Chavez* (2018) 22 Cal.App.5th 663, the court also addressed remand for resentencing after Senate Bill 620. It concluded that remand was necessary because the record did not clearly indicate the trial court would have declined to strike the firearm enhancement because "[a]lthough the court expressed its concern regarding [the defendant's] criminal history [and the] 'senseless' shooting," the court imposed the low term on one of the counts. Remand for resentencing was ordered. (*Id.* at pp. 713-714.)

On the other hand, in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, the court addressed the possibility of remand in a case involving the courts discretion to strike "Three Strikes" prior convictions in the furtherance of justice. (*Id.* at p. 1896.) In that case the appellate court declined to remand for resentencing, finding, "[T]he trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the Three Strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Ibid.*)

Here, although the trial court imposed consecutive LWOP sentences, this case is more akin to *McDaniels* and *Chavez* because the record provides no "clear indication" that the trial court would decline to exercise its recently conferred discretion to reduce defendant's sentence on the firearm enhancements. Here, the trial court made very few

comments during sentencing, presumably because of the mandatory nature of the sentence. It did state defendant was not eligible for probation and there were no mitigating factors, but made no clear indication that defendant was the type of offender who deserved the maximum sentence. While the trial court could have imposed concurrent LWOP sentences, it did impose consecutive sentences. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1564.) However, this does not clearly indicate it would have refused to strike the firearm enhancements. The appropriate remedy is to remand for resentencing to allow the trial court to consider whether to exercise its discretion to strike or dismiss the section 12022.53, subdivision (d) firearm enhancements.

DISPOSITION

Defendant's sentence is vacated and the matter is remanded for resentencing for the limited purpose of allowing the trial court to consider whether the section 12022.53, subdivision (d) enhancements should be stricken or imposed pursuant to section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

RAPHAEL
J.